Supreme Court, U.S.
FILED
MAY 22 1995
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(2)

No. 94-1740

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

PACIFIC NORTHWEST GENERATING COOPERATIVE,
Petitioner,
vs.
NORTHWEST POWER PLANNING COUNCIL, et al.,
Respondents.

BRIEF FOR RESPONDENT NORTHWEST POWER PLANNING COUNCIL

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May 22, 1995.

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QUESTION PRESENTED

Whether to grant certiorari on a question of statutory interpretation raised by the Ninth Circuit Court of Appeals in dictum in 35 F.3d 1371 (9th Cir. 1994), construing the Northwest Power Planning Council's 1992 Strategy for Salmon, which was superseded in 1994 without challenge on this issue.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
A. Background	1
B. The 1992 Strategy for Salmon	3
C. Conclusion	6

APPENDIX

1. Idaho Power Company Petition for Review and Docketing Statement.
2. Order of Dismissal.

TABLE OF AUTHORITIES

Cases

Page

Northwest Resource Information Center, Inc. v. Northwest Power Planning Council, 35 F.3d 1371 (9th Cir. 1994) ..... *passim*

Statutes, Regulations and Rules

16 U.S.C. §§ 839 et seq. 2
16 U.S.C. § 839b(e)(2) 2
16 U.S.C. § 839b(h)(5) 2
16 U.S.C. § 839b(h)(2), (3), (5) 2
16 U.S.C. § 839f(e)(5) 3

Federal Register

56 Fed. Reg. 56935 (1992) 3
59 Fed. Reg. 67351-52 4

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BRIEF FOR RESPONDENT NORTHWEST POWER PLANNING COUNCIL

ARGUMENT

Petitioner is seeking a review of certain dicta contained in the decision of the Ninth Circuit Court of Appeals in *Northwest Resources Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994), concerning the Northwest Power Planning Council's Strategy for Salmon adopted in December of 1992. Since the Ninth Circuit's decision, the Strategy for Salmon has been superseded by the 1994 Columbia River Basin Fish and Wildlife Program. The question raised by Petitioner concerns dicta, involves an agency action that has been superseded, and the petition should therefore be denied.

A. Background

The history and background of the Pacific Northwest Electric Power Planning and Conservation Act (the Act),

16 U.S.C. §§ 839 et seq., are extensively discussed in *Northwest Resource Information Center, Inc.*, 35 F.3d 1371 (9th Cir. 1994). Without repeating that discussion, a few points by way of background are important.

In 1980, Congress adopted the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 et seq., to head off a forecasted regional energy crisis and to address huge fish and wildlife losses. The Act created the Northwest Power Planning Council, a regional inter-state compact agency of eight members, two appointed by each of the Governors of Oregon, Washington, Idaho and Montana.

The Act gave the Council dual responsibilities for power planning and fish and wildlife restoration planning. It directed the Council to prepare a power plan that gives due consideration to "protection, mitigation and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful mitigation, survival, and propagation of anadromous fish." Act, § 4(e)(2), 16 U.S.C. § 839b(e)(2). The Act also directs the Council to develop a program of "measures to protect, mitigate and enhance fish and wildlife affected by [hydropower] facilities while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply." Id. § 4(h)(5), 16 U.S.C. § 839b(h)(5).

Each time it revises the regional power plan, the Council must also update its fish and wildlife program. The process begins with a call for recommendations. Based upon these recommendations, and other information, the Council develops the program. Id., §§ 4(h)(2), (3), (5), 16 U.S.C. §§ 839b(h)(2), (3), (5).

As mandated by the Act, the Council promulgated its first fish and wildlife program called the Columbia Basin Fish and Wildlife Program in November 1982. (Pet. App. 15b).

This program was amended in 1984, 1985 and 1987. (Pet. App. 16b, 17b).

B. The 1992 Strategy for Salmon

In 1991, the Council adopted a four phase decision making process to amend the fish and wildlife program. The first three phases of this process culminated in the Council's adoption of the Strategy for Salmon in December 1992 (1992 Strategy). (Pet. App. 18b); See 56 Fed. Reg. 56935 (1992).

The 1992 Strategy was challenged by a variety of entities including a group of direct purchasers of Bonneville Power Administration power as well as several environmental groups and the Yakama Indian Nation. These actions were filed in the Ninth Circuit Court of Appeals as required by the Northwest Power Act. 16 U.S.C § 839f(e)(5).

On September 9, 1994, the Ninth Circuit Court of Appeals issued its decision in *Northwest Resources Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994), the decision challenged by Petitioner. The Court remanded the program back to the Council holding that the Council had failed in two requirements:

1. to explain the statutory basis for its rejection of recommendations of fishery managers, and

2. to evaluate proposed program measures against sound biological objectives.

In dictum, the Court considered a number of statutory interpretation issues in an effort to aid the parties on remand. (Pet. App. 30b). This discussion included the "due weight" issue here raised by Petitioner. Notwithstanding such dicta discussion, the Court specifically did not decide this question, stating ". . . we do not decide here whether the Council abused its discretion in giving or failing to give proper deference to fishery managers because the record as

it stands precludes such a inquiry . . . ." *Northwest Resources Information Center, Inc.*, 35 F.3d at 1389; (Pet. App. 36b).

After the 1992 Strategy was adopted, but before the opinion in *Northwest Resources Information Center, Inc.*, the Council had already, in January 1994:

1. adopted further resident fish and wildlife measures and combined them with the 1992 Strategy into the Columbia River Basin Fish and Wildlife Program;

2. issued a request to fish and wildlife agencies, tribes and interested parties to submit further recommendations for amendments to that program[1]; and,

3. in August 1994, received such recommendations.

After receiving the Ninth Circuit opinion and conferring with fish and wildlife agencies, tribes and other interested parties, the Council decided that it could address the court's holding in the process of dealing with the August 1994 recommendations.

This process culminated in December of 1994 with the Council's adoption of the 1994 Columbia River Basin Fish and Wildlife Program (1994 Program) which superseded the 1992 Strategy and set out the Council's own interpretation of the issue of which Petitioner now complains. 59 Fed. Reg. 67351-52 (December 29, 1994). Yet, it is the Ninth

---

[1] The request for recommendations was prompted by several factors: 1) the 1992 Strategy for Salmon called for the Council to review the results of several evaluations in 1994 and decide how to proceed in light of them; 2) the Council had decided to conduct a major review of its power plan, which triggers a request for fish and wildlife recommendations (16 U.S.C. § 839b(h)(2); and 3) developments under the Endangered Species Act suggested the need for a broader review of salmon issues.

Circuit opinion concerning the superseded 1992 Strategy from which Petitioner seeks review.

The 1994 Columbia River Basin Fish and Wildlife Program was challenged in the Ninth Circuit Court of Appeals by only one party, Idaho Power Company. (A1-7). Idaho Power claimed error in two respects, neither involving the "due weight" issue raised here by Petitioner, nor the way this provision was interpreted by the Council in its December 1994 action. (A5). On April 21, 1995, the Idaho Power Company petition was dismissed upon stipulation of the parties. (A8). Neither the Petitioner nor anyone else challenged the 1994 Program claiming a misinterpretation of the "due weight" issue raised here by Petitioner against the superseded 1992 Strategy.

The Council's now unchallenged 1994 Columbia River Basin Fish and Wildlife Program is currently in effect. Petitioner seeks review of lower court dicta that concerns the superseded 1992 Strategy.

C. Conclusion

The petition for a writ of certiorari should be denied.

Dated: May 22, 1995.

Respectfully submitted,

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APPENDIX 1

Idaho Power Company Petition for Review and Docketing Statement.

NO.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO POWER COMPANY, an Idaho corporation
Petitioner,

vs.

NORTHWEST POWER PLANNING COUNCIL,
Respondent.

PETITION FOR REVIEW UNDER THE
NORTHWEST POWER ACT

Pursuant to 16 U.S.C. § 839f(e)(5), Federal Rule of Appellate Procedure 15, and Ninth Circuit Rule 15-1, Idaho Power Company ("IPCo") hereby petitions this Court for review of the Northwest Power Planning Council's 1994 Columbia River Basin Fish and Wildlife Program ("1994 Program") dated December 14, 1994. Notice in the Federal Register indicates that the Council adopted the 1994 Program on December 15, 1994. *See* 59 Fed. Reg. 67351-52 (Dec. 29, 1994).

At this time, IPCo is not aware of any other petitions for review concerning the 1994 Program.

Dated: February 23, 1995.

/s/ KAREN M. MCGAFFEY

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Idaho Power Company

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT

INTERNAL USE ONLY

Please Type or Print. Attach Additional Pages if Necessary.

Title in full:

IDAHO POWER COMPANY
Petitioner,

VS.

NORTHWEST POWER PLANNING COUNCIL,
Respondent.

District: N/A
Judge: N/A
Date Complaint Filed: N/A
District Court Docket Number: N/A
Date Notice of Appeal Filed: 2/24/95
Is this a Cross-Appeal? ___ Yes XX No

Has this matter been before this Court previously? No
Case Name:
Citation:
Docket Number:

Check as many as apply:

JURISDICTION

1. Federal
(X) Federal Question
( ) Diversity
( ) Other (Specify)

2. Appellate
( ) Final Decision of District Court
( ) Interlocutory Decision Appealable as of Right

( ) Interlocutory Order Certified by District Judge (Specify)
(X) Other (Specify)
Petition for Review Pursuant to 16 U.S.C. 839f(e)

DISTRICT COURT DISPOSITION

1. State of Procedures
( ) Pre-Trial
( ) During Trial
( ) After Trial

2. Type of Judgment/Order Appealed
( ) Default Judgment
( ) Judgment/Court Decision
( ) Declare All Jurisdiction
( ) Judgment/Injury Verdict
( ) Dismissal/Reports
( ) Summary Judgment
( ) Judgment Move
( ) Declaratory Judgment
( ) Directed Verdict
( ) Other Specify

3. Relief
( ) Damages:
Amount Sought: $_____
Amount ( ) Granted:
( ) Denied: $_____
( ) Injunctions
( ) Preliminary or ( ) Permanent
( ) Granted or ( ) Denied

Brief Description of Nature of Action and Result Below:

On December 14, 1994, the Northwest Power Planning Council (the "Council") adopted the 1994 Columbia River Basin Fish and Wildlife Program"). Petitioner seeks review of the Program pursuant to 16 U.S.C. § 839f(e).

Issues proposed to be raised on appeal:

1. Whether the Council violated the Northwest Power Act and the Administrative Procedure Act by adopting the 1994 Program without providing a meaningful opportunity for public participation and comment.

2. Whether the Council violated the Northwest Power Act by failing to properly establish and articulate "sound biological objectives" prior to developing the 1994 Program.

BASED ON YOUR PRESENT KNOWLEDGE:

1. Does this appeal involve a question of first impression? XX YES ___ NO

2. Will the determination of this appeal turn on the interpretation or application of a particular case or statute? XX YES ___ NO If yes, provide:

Case name/statute: 16 U.S.C. § 839b

Citation: _____

Docket number, if unreported: _____

3. Is there any case now pending or about to be filed in this court or any other court or administrative agency which:

a) Arises from substantially the same case or controversy as this appeal? ___ YES XX NO

b) Involves an issue that is substantially the same, similar or related to an issue in this appeal? ___ YES XX NO

Case name: _____

Citation: _____

Court or agency: _____

Docket number, if unreported: _____

4. Will this appeal involve a conflict of law within the Ninth Circuit? ___ YES XX NO

Among circuits? ___ YES XX NO

If yes, explain briefly:

_____

_____

_____

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

___ Possibility of settlement;
___ Likelihood of a motion to expedite the appeal;
___ Multiple parties on either side for whom joint briefing is possible;
XX Likelihood of motions to intervene on appeal;
___ Likelihood of motions to file amicus briefs;
___ Likelihood of motions to stay appeal pending resolution of a related case. Identify case name, docket number and court or agency:

_____

_____

_____

XX Other procedural complexities:
Likelihood of multiple parties with conflicting contentions

COUNSEL FOR Petitioner

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FIRM: Bogle & Gates

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601 Union St., Seattle, WA 98101

TELEPHONE: (206) 682-5151

I CERTIFY THAT A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SUBMITTED TO CLERK OF THE DISTRICT COURT OR THE CLERK OF U.S. COURT OF APPEALS, AND THAT IT WAS SERVED ON EACH PARTY/COUNSEL SHOWN ON THE ATTACHED SERVICE LIST.

/s/ Karen McGaffey 2/23/95

Signature Date

REMEMBER TO ATTACH COPIES OF ORDER/JUDGMENT APPEALED FROM AND SERVICE LIST WITH TELEPHONE NUMBERS

APPENDIX 2

Order of Dismissal.

No. 95-70205

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO POWER COMPANY, an Idaho corporation,
Petitioner,
vs.
NORTHWEST POWER PLANNING COUNCIL,
Respondent.

ORDER

The parties have stipulated to the dismissal of this petition for review under Fed. R. App. P. 42(b). The petition for review is dismissed. Each party shall bear its own costs.

A certified copy of this order sent to the agency shall act as and for the mandate of this court.

All pending motions are denied as moot.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ Jeffrey L. Crocker

Jeffery L. Crocker
Deputy Clerk

pro 4.17